SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 96

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS

vs.

ISADORE LUVISCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1 In United States Circuit Court of Appeals, Eighth Circuit

No. 6125.—May Term, 1923

W. I. BIDDLE, WARDEN OF THE UNITED STATES Penitentiary at Leavenworth, Kansas, appellant vs. ISADORE LUVISCH, APPELLEE	Appeal from the District Court of the United States for the District of Kansas

Certificate to the Supreme Court of the United States

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that the record on an appeal now pending before it, discloses the following:

The appellee had been indicted in the District Court of the United States for the Eastern District of Michigan in three counts, to which he entered a plea of guilty, and thereupon was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for five years. While in prison he applied to the District Court of the United States for the District of Kansas for a writ of habeas corpus, and upon a hearing of the petition a judgment was entered discharging him from imprisonment on the ground that none of the three counts in the said indictment to which he had entered a plea of guilty and was sentenced, constituted a violation of any law of the United States. Each of the three counts is based upon the same facts, except that the first count charges the making of a plate to be in the likeness and similitude of certain plates designed by the Dominion of Canada, a foreign government, for the printing of the genuine issues of certain obligations and securities of said Government. The second count charges him with possession of that plate, and the third count charges him with the sale of 1,200 counterfeit prints from said plate in the likeness and similitude of the genuine obligations and securities of that foreign Government. The

2 description of these securities and obligations of the Dominion of Canada is set out in each count, and for this reason we deem it only necessary to set out the first count of the indictment, which differs from the other counts only as stated. That count, omitting the jurisdictional allegations, charges that the defendant "did then and there unlawfully, wilfully, feloniously and knowingly, and without lawful authority, cause and procure to be made and engraved a certain zinc half-tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to wit, the Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foriegn government, to wit, certain inland excise stamps of the denomination of one cent, bearing the following words and figures, to wit: The numerals '1912' at each end and in the center of said stamp, and the words 'Certified manufactured in the year'; and the signature of, to wit, 'J. W. Vincent,' and a large scroll numeral

'1,' all on the left side of the center of said stamp, and in the center thereof the word 'Ottawa' above the numerals '1912,' and beneath said numerals the word 'Canada,' and on the right of the center of said stamp appears first the word 'cent' and then 'bottled in bond under excise supervision, Deputy Minr. Inland Revenue.'"

It is further certified that the following question of law is presented by the appeal prosecuted by the warden of said penitentiary, the respondent in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon it:

Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of sections 147 and 161 of the act of March 4, 1909 (35 Stat. 1088) known as the Penal Code of 1910?

ROBT. E. LEWIS,
U. S. Circuit Judge.
JACOB FISCHER,
U. S. District Judge.
WILBUR F. BOOTH,
U. S. District Judge.

[File endorsement omitted.]

3 In United States Circuit Court of Appeals, Eighth Circuit

Clerk's certificate

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of W. I. Biddle, warden of the United States Penitentiary at Leavenworth, Kansas, appellant, vs. Isadore Luvisch, No. 6125, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Paul, Minnesota, in the Eighth Circuit, this nineteenth day of June, A. D. 1923.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit.

[File indorsement omitted.]

(Indorsement on cover:) File No. 29703. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 96. W. I. Biddle, warden of the United States Penitentiary at Leavenworth, Kansas, vs. Isadore Luvisch. (Certificate.) Filed June 25th, 1923. File No. 29703.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

W. I. BIDDLE, WARDEN
v.
ISIDORE LUVISCH
No. 96

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE WARDEN

STATEMENT

Defendant entered a plea of guilty to an indictment charging, so far as is pertinent here, that he (R. p. 1)—

> did then and there unlawfully, wilfully, feloniously and knowingly, and without lawful authority, cause and procure to be made and engraved a certain zinc half-tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to wit, the Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foreign government, to wit, certain inland excise stamps of the denomination of one cent, bearing the following words and figures, to

> wit: The numerals '1912' at each end and in the center of said stamp, and the words 'Certified manufactured in the year'; and the signature of, to wit, 'J. W. Vincent,' and a large scroll numeral '1', all on the left side of the center of said stamp, and in the center thereof the word 'Ottawa' above the numerals '1912,' and beneath said numerals the word 'Canada,' and on the right of the center of said stamp appears first the word 'cent' and then 'bottled in bond under excise supervision Deputy Minr. Inland Revenue.'

He was thereupon sentenced to serve five years' imprisonment in the United States Penitentiary at Leavenworth, Kansas. After he had entered upon the execution of his sentence he sued out a writ of *habeas corpus* attacking the indictment. The trial court ordered his discharge and the case was then taken to the Circuit Court of Appeals for review. That court rendered an opinion, one judge dissenting reversing the judgment of the trial court. The majority and minority opinion are reported in 287 Fed. 699. For some reason not appearing in the record, the opinions were set aside, and the following question certified to this court (R. p. 2):

> Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of sections 147 and 161 of the act of March 4, 1909 (35 Stat. 1088), known as the Penal Code of 1910?

ARGUMENT

The answer of this court to the question of the Circuit Court of Appeals should be to the effect that on habeas corpus the indictment here involved states an offense under the laws of the United States

The question certified to this court, viz., whether the indictment states an offense against the United States, is plainly one which orderly procedure required the defendant to submit to the trial court, and if dissatisfied with its ruling, to seek a review in the Circuit Court of Appeals on writ of error. He refused to do this, however, entered a plea of guilty, and undertook to reserve the question for subsequent determination on *habeas corpus*. This court on numerous occasions has emphatically ruled that *habeas corpus* may not be so utilized. *Matter of Gregory*, 219 U. S. 210, 213, is in point. The question there presented was stated and disposed of in the following language:

> The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding can not be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render the judgment. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127

U. S. 731; *Gonzales* v. *Cunningham*, 164 U. S. 612; *In re Eckart*, 166 U. S. 481; *Storti* v. *Massachusetts*, 183 U. S. 138; *Dimmick* v. *Tompkins*, 194 U. S. 540; *Hyde* v. *Shine*, 199 U. S. 62, 83; *Whitney* v. *Dick*, 202 U. S. 132, 136; *Kaizo* v. *Henry*, 211 U. S. 146, 148. This rule has recently been applied in a case where it was contended in a *habeas corpus* proceeding that the record should be examined to determine whether there was any testimony to support the accusation. And this court, affirming the judgment which discharged the writ, said by Mr. Justice Day: "The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Harlan* v. *McGourin*, 218 U. S. 442.

And at again pages 217 and 218 of the opinion:

> Given a valid enactment, the question (assuming it to be one demanding judicial examination) whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offenses to which the statute relates.

> As said by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, on p. 203: "The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it." And in *Ex parte Parks*, 93 U. S. 18, on page 20, the court said: "Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question."

A further exposition of the limited scope of *habeas corpus* was made in *Glasgow* v. *Moyer*, 225 U. S. 420, 429, wherein it was said:

> The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if

raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

* * * * *

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

In *Toy Toy* v. *Hopkins*, 212 U. S. 542, 548, the petition for the writ alleged facts which it was claimed disclosed not only lack of jurisdiction of the subject

matter set forth in the indictment, but also lack of jurisdiction of the person. In affirming the judgment below denying the writ, this court said (p. 548):

> If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which on the merits we do not hold, the Circuit Court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and *habeas corpus* can not be availed of as a writ of error.

See also *Ex parte Parks*, 93 U. S. 18, 20, where this court refused to determine on *habeas corpus* whether the forged document described in the indictment was covered by the statutes drawn in question.

The case of *Louie* v. *United States*, 254 U. S. 548, 551, while not a *habeas corpus* case, seems to fully support the view that the question whether the excise stamp here involved is an obligation or security of the Dominion of Canada, is not jurisdictional, and therefore not open to review on *habeas corpus*.

As further showing the insistence of this court that convicted defendants may not disregard the usual procedure for review in criminal cases, viz, by writ of error, and seek review by the short route of *habeas corpus*, see *Riddle* v. *Dyche*, 262 U. S. 333, 335.

For the purpose of the present case, it would seem to make no difference under *Matter of Gregory*, 219 U. S. 210, whether the excise stamps involved must be tested by our laws or the laws of Canada. In

either case it would appear to be necessary to first determine the function and characteristics of such a stamp as a condition precedent to deciding whether it was or was not an obligation or security. Section 161 of the Criminal Code of the United States, which defines the offense, reads as follows:

> Whoever, within the United States or any place subject to the jurisdiction thereof, except by lawful authority, shall have control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, or shall use such plate, stone, or other thing, or knowingly permit or suffer the same to be used in counterfeiting such foreign obligations, or any part thereof; or whoever shall make or engrave, or cause or procure to be made or engraved, or shall assist in making or engraving, any plate, stone, or other thing, in the likeness or similitude of any plate, stone, or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation; or whoever shall print, photograph, or in any other manner make, execute, or sell, or cause to be printed, photographed, made, executed, or sold, or shall aid in printing, photographing, making, executing, or selling, any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any

> foreign government, bank, or corporation; or whoever shall bring into the United States or any place subject to the jurisdiction thereof, any counterfeit plate, stone, or other thing, or engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

The suggestion that as Congress by Section 147 of the Criminal Code specifically included stamps in the words "obligations or securities of the United States," and omitted stamps from Section 161 of said code, this shows a legislative intent not to include stamps as foreign obligations or securities, is untenable, for on the same principle it would be necessary to exclude from Section 161 the other instruments named in Section 147, which are clearly obligations or securities. The only purpose of Section 147 was to make sure that the instruments named therein were included in the words "obligation or other security," by those who should thereafter be called upon to enforce the statute. It is no authority for restricting the language in Section 161 of the Criminal Code, supra. In other words, Section 161 is to be interpreted as though Section 147 had not been enacted. The very language of Section 147, supra, seems to compel this conclusion. It reads as follows:

> The words "obligation or other security of the United States" shall be held to mean

all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representations of value, of whatever denomination, which have been or may be issued under any act of Congress.

Pertinent here is the Act of March 3, 1923, Chap. 218, 42 Stat. 1437, reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That nothing in sections 161, 172, and 220 of the Act entitled 'An Act to codify, revise, and amend the penal laws of the United States,' approved March 4, 1909 (Thirty-fifth Statutes at Large, at pages 1118, 1121, and 1132), shall be construed to forbid or prevent the printing or publishing of illustrations in black and white of foreign postage or revenue stamps from plates so defaced as to indicate that the illustrations are not adapted or intended for use as stamps, or to prevent or forbid the making of necessary plates therefor for use in philatelic or historical articles, books, journals, or albums, or the circulars of legitimate publishers or dealers in such stamps, books, journals, or albums. Nothing in said sections shall be construed to forbid or prevent similar illustrations, in black and white only, in philatelic or historical articles, books, journals, albums, or the circulars of legitimate publishers or

> dealers in such stamps, books, journals, albums, or circulars, of such portion of the border of a stamp of the United States as may be necessary to show minor differences in the stamp so illustrated, but all such illustrations shall be at least four times as large as the portion of the original United States stamp so illustrated.

This statute must be taken to mean, in any event, that there had been no prior legislative intent to withhold revenue stamps from the application of Section 161 if the language there used was otherwise capable of embracing such stamps.

We come then to consider the status of revenue stamps under the laws of Canada.

Section 546, Criminal Code of Canada, 1906, Amendments 1907–1916, p. 146, under the heading of "Offences Relating to Bank Notes, Coin and Counterfeit Money," provides, so far as here pertinent, as follows:

In this Part, unless the context otherwise requires,—

* * * * *

> (f) 'counterfeit token of value' means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money. 55–56 V., c. 29, s. 460; 63–64 V., c. 46, s. 3.

Section 2, par. 40, of the same Code, pp. 1 and 6, provides as follows:

In this Act, unless the context otherwise requires,—

* * * * *

(40) 'valuable security' includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal;

The foregoing seems sufficient to disclose the difficulty of attempting to determine on *habeas corpus*

the question of fact here involved, viz, whether under the laws of Canada inland excise stamps are obligations or securities of that country. *Church* v. *Hubbart*, 2 Cranch 187, 235, and *Ennis* v. *Smith*, 14 How. 400, 427. In any event the burden would seem to rest upon the defendant to clearly demonstrate that the stamps involved are not such obligations or securities. On this aspect the case is closely analogous to *Ex parte Parks*, 93 U. S. 18, 20, in which this court in speaking of the instrument there involved, said:

> At all events, it is not clear and free from all doubt that the forgery is not within the terms of the statute.

This court held that the question was not open on *habeas corpus*.

In view of the foregoing it is respectfully submitted that this court should either refuse to answer the question certified because no duty rests upon the Circuit Court to solve it on the record before it, or the answer of this court should be that on *habeas corpus* the indictment charges an offense within the meaning of Section 161 of the Criminal Code.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

OCTOBER, 1924.

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